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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 JERRY D. ELSTER, No. C 04-2383 WHA (PR)
11 Petitioner,
12 v.
13 JILL BROWN, Warden,
14 Respondent.

**DENIAL OF CERTIFICATE OF
APPEALABILITY**

16 This is a habeas case under 28 U.S.C. § 2254 filed pro se by a state prisoner. The
17 petition was denied in a ruling entered on September 27, 2006. On October 19, 2006, he filed a
18 notice of appeal and a motion for leave to proceed in forma pauperis on appeal. Although he
19 does not request a certificate of appealability, the notice of appeal will be deemed a request for
20 the certificate. *See United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).

21 A petitioner may not appeal a final order in a federal habeas corpus proceeding without
22 first obtaining a certificate of appealability (formerly known as a certificate of probable cause to
23 appeal). *See* 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b). A judge shall grant a certificate of
24 appealability "only if the applicant has made a substantial showing of the denial of a
25 constitutional right." 28 U.S.C. § 2253(c)(2). The certificate must indicate which issues satisfy
26 this standard. *See id.* § 2253(c)(3).

27 "Where a district court has rejected the constitutional claims on the merits, the showing
28 required to satisfy § 2253(c) is straightforward: the petitioner must demonstrate that reasonable

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1 jurists would find the district court's assessment of the constitutional claims debatable or
2 wrong." *Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000).

3 The petition was denied because there were a number of factors in addition to the nature
4 of the offense to support the denied of parole – for instance, petitioner had been convicted of
5 manufacturing and possessing a weapon while in prison. Reasonable jurists would not find the
6 result here debatable or wrong. The certificate of appealability implied from the notice of
7 appeal is **DENIED**. Petitioner's motion to proceed in forma pauperis on appeal (document
8 number 18) is **DENIED**.

9 The clerk shall transmit the file, including a copy of this order, to the Court of Appeals.
10 See Fed. R.App.P. 22(b); *United States v. Asrar*, 116 F.3d 1268, 1270 (9th Cir. 1997).
11 Petitioner may then ask the Court of Appeals to issue the certificate, *see* R.App.P. 22(b)(1), or if
12 he does not, the notice of appeal will be construed as such a request, *see* R.App.P. 22(b)(2). He
13 may also ask the court of appeals to permit him to proceed IFP on appeal.

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15 **IT IS SO ORDERED.**

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17 Dated: October 25, 2006.

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WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE